87-1807

No.

Supreme Court, U.S.
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CLERK

In The Supreme Court of the United States

October Term, 1988

JULIO DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the absence of statutory authority it was proper for the District Court to increase the sentence petitioner had already commenced to serve?

2. Whether due process was violated when, after appeal, the increase in petitioner's sentence was not predicated on events occurring subsequent to the original sentencing?

CASES CITED

McClain v. United States, 676 F.2d 915, *cert. denied* 459 U.S. (1982) 2,3,5,6,7

Ralston v. Robinson, 454 U.S. 201, 217 n.10 (1981) 4,5

Roberts v. United States, 320 U.S. 264 (1943) 4

United States v. Diaz, 778 F.2d 86 (2d Cir. 1985) 1,2

United States v. Diaz, 797 F.2d 99 (2d Cir. 1986) 1,3

United States v. Diaz, (Docket No. 87-1107, dec'd December 2, 1987) 1,3,6

United States v. DiFrancesco, 449 U.S. 117 (1980)..4,6,7,8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Julio Diaz respectfully moves this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 8, 1988.

OPINIONS BELOW

On three occasions the United States Court of Appeals for the Second Circuit reviewed the sentences imposed upon petitioner, Julio Diaz. *United States v. Diaz,* 778 F.2d 86 (2d Cir. 1985) (Diaz I); *United States v. Diaz,* 797 F.2d 99 (2d Cir. 1986) (Diaz II); *United States v. Diaz* (Docket No. 87-1107, dec'd December 2, 1987) (Diaz III) (Petitioner's Appendix A, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit denying petitioner's application for rehearing containing a suggestion that the appeal be reheard *en banc* was entered on March 8, 1988. This Court has jurisdiction to review the judgment of the Circuit Court by writ of certiorari pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment V

"*** Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On November 21, 1985 the Court below reversed petitioner's conviction under 18 U.S.C. §924(c) on the grounds that the sentence enhancement provisions of that statute do not apply to the narcotics offenses of which petitioner also was convicted. *U.S. v. Diaz,* 778 F.2d 86 (2nd Cir. 1985). Petitioner's convictions on the narcotics offenses were affirmed and pursuant to that Court's decision in *McClain v. United States,* 676 F.2d 915, *cert. denied* 459 U.S. (1982), the Court remanded the narcotics counts for resentencing "so that the district court will have latitude to increase the sentences on counts One, Four and Six if it concludes that such increases are necessary."

The District Court had originally imposed four years imprisonment on counts One, Four and Six, to be served concurrently, and an additional five years on the 18 U.S.C. §924(c) conviction, for an overall term of imprisonment of nine years.

Upon resentence, the Court increased the sentence on counts one, four, and six such that the total time served by petitioner would be the same as though the conviction on Count 5 had not been reversed, i.e. the Court sentenced petitioner to 9 years on count one; 9 years on count four, with a special parole term of three years, and 9 years on count 6. All time was to be served concurrently.

This first resentencing occurred on January 22, 1986. The District Court file shows, however, that after this Court's remand and prior to the date of resentencing, the District Court Judge, Hon. John F. Keenan, participated in certain out-of-court oral and written communications about petitioner's case.

Consequently, the Court below in its decision in *U.S. v. Diaz,* 797 F.2d 99, 100 (2nd Cir. 1986) remanded the judgment for reassignment to another Judge for resentencing. This remand was based upon the grounds that that appearance of justice was not satisfied and that the district judge's impartiality with respect to the sentencing procedure might reasonably be questioned.

However, the Court stated that it *specifically* did not ". . . reach Diaz's argument that, despite *McClain,* due process was violated when his sentence was increased subsequent to the original sentencing." (id. p. 100).

Neither did the Court reach petitioner's due process argument, which was the impropriety, in the absence of statutory authority, for the District Court to increase the sentence the petitioner had already started to serve. This issue was again presented to the Court in *Diaz* III. This question was ultimately answered in the negative. *Op. below App. A.*

Upon the second resentencing, of February 19, 1987, by Judge Leisure, the petitioner was sentenced to three years of imprisonment on each of Counts 1, 4, and 6, *all sentences to be consecutive.* In the Court's own words ". . . the total sentence is nine years imprisonment." (S.M.28). The Court also imposed a special parole term of three years on Count 4, and assessed $50 on each of counts 1, 4, and 6, for a total of $150.00.

REASONS FOR GRANTING THE WRIT

I

While increasing a sentence already imposed on a valid conviction may or may not violate precepts of Double Jeopardy, *United States v. DiFrancesco,* 449 U.S. 117 (1980), nevertheless, a court may not make such an increase in the absence of statutory authority. *United States v. DiFrancesco,* 449 *U.S.* at 139; *Ralston v. Robinson,* 454 U.S. 201, 217 n.10 (1981); *ibid.* at 224 n.3. (Stevens, J. dissenting); *Roberts v. United States,* 320 U.S. 264 (1943).

Thus, responding in *DiFrancesco* to the argument that a sentence cannot be increased once a defendant has started to serve it, this Court observed:

> "That argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal." 449 U.S. at 139.

In *Ralston* the majority observed:

> "The dissenting opinion asserts that our interpretation of congressional intent is inconsistent with the

> common-law rule that 'a punishment already partly suffered be not increased'. . . . That common-law rule simply does not apply when Congress has provided a court with the power to modify a sentence in light of changed circumstances." 454 U.S. 217 n.10.

And dissenting in *Ralston,* Justice Stevens similarly read *DiFrancesco* to mean an increase in a sentence "is limited to the situation in which *Congress* has expressly authorized an increase of sentence after the initial sentence has been set aside on *direct appeal.*" 454 U.S. at 224 n.3 (emphasis in original).

Thus, the only circumstance in which this Court has permitted an increase in a validly imposed sentence which a defendant has started to serve is when Congress has expressly permitted such an increase by statute. Indeed, in *Ralston* both the majority and dissent agreed on this principle; they only disagreed whether the statute at issue could be read to permit the change in sentence.

In the instant case there is no statute which expressly or even implicitly authorized Judge Leisure to increase petitioner's sentence from 4 to 9 years for a conviction which had not been reversed. The court below's decision in *McClain v. United States,* 643 F.2d 911 (2nd Cir. 1981) *cert. denied* 452 U.S. 919) (1981), authorizing resentencing under the general supervisory powers of the Court (28 U.S.C. §2106) was therefore incorrectly decided. Section 2106 is simply too general to permit the type of increase in sentencing this Court has permitted only pursuant to an express legislative authorization.*

*Petitioner further contends that the increase in his sentence violates Double Jeopardy. In the absence of a statute permitting an increase in his sentence, he had a right to expect the original sentence was final.

In *McClain* the Court below repudiated the long held rule within the Second Circuit and other circuits that "increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy" *McClain v. United States, supra,* 676 F.2d at 917, upon the ground that this Court's decision in *United States v. DiFrancesco,* 449 U.S. 117 (1980) eroded this rule. Relying upon *McClain,* and the decision in *Diaz I,* which followed *McClain,* the *Diaz III* panel rejected *Diaz's* double jeopardy argument.

Notably, the decision in *DiFrancesco* did not erode this rule, nor did it purport to effect it in any manner. The Court noted that the

> "Double jeopardy clause was drafted with the common-law protections in mind . . . This accounts for the established practice in the Federal Courts that the sentencing Judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation). So long as he has not yet begun to serve that sentence."

United States v. DiFrancesco, supra 449 U.S. at 134.

DiFrancesco addressed itself to the question of whether double jeopardy considerations have any "significant application to the prosecution's statutorily granted right to review a sentence." *Id* at 136. It answered this question in the negative.

Indeed, the *DiFrancesco* Court explicitly took the statutorily mandated Government appeal of a sentence out of the double jeopardy sentencing rule, and left the rule itself intact:

> "Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the Trial Judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal."

Id. at 139.

Thus, *McClain* and *Diaz* rest on tenuous grounds. Indeed, this Court's decision in *Pennsylvania v. Goldhammer, supra,* 474 U.S. at 29 (1985) explained the import of its decision in *DiFrancesco;* "In *DiFrancesco* a *federal statute* clearly allowed the appellate review of the sentences at issue. The Court noted that, *in light of that statute,* the defendant could not claim an expectation of finality in his original sentencing." *Id.* (emphasis added).

Since a federal statute was not at issue in either *McClain* or *Diaz,* the longstanding rule that after a defendant has commenced service of a sentence, that sentence cannot be increased, should have been applied. Because this rule was abrogated, resentencing decisions of the Court below have been made by various panels and other circuits on an *ad hoc* basis with no unifying rationale to support them. Thus, in *McClain* the panel apparently considered the fact that the defendant committed five serious violations of prison rules after his original sentencing. However, a higher sentence was also approved for *Diaz* whose post-sentencing record was exemplary. The rationale offered in *Diaz* in support of the higher sentence imposed was that the intent of the original sentencer was being carried out. However, *Diaz'* original sentence was vacated because of the taint of judicial impropriety attendant in its imposition. Thus, that rationale cannot support the result reached here.

In sum, the double jeopardy rule relative to sentencing was established so that defendants could anticipate finality. See *United States v. DiFrancesco, supra,* 449 US at 134. The abrogation of this rule created a circumstance where there is neither finality nor predictability. We therefore respectfully urge that the petition for a writ of certiorari be granted.

CONCLUSION

For the foregoing reasons a writ of certiorari should be issued to review the opinion and judgment of the Court below.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 144—August Term 1987

Submitted: October 27, 1987

Decided: December 2, 1987

Docket No. 87-1107

UNITED STATES OF AMERICA,

Appellee,

-against-

JULIO DIAZ,

Appellant.

Before:

FEINBERG, *Chief Judge,*
NEWMAN and WINTER, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Peter K. Leisure, J., entered upon remand, 797 F.2d 99, resentencing defendant on various offenses. The resentencing of defendant was proper.

Affirmed.

WILLIAM LUPO, Brooklyn, NY (Norman A. Olch, Joseph P. Grancio, of Counsel), *for Appellant.*

VIKTOR V. POHORELSKY, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Bruce A. Green, Assistant United States Attorney, of Counsel), *for Appellee.*

FEINBERG, *Chief Judge:*

Julio Diaz appeals from a judgment of conviction in the United States District Court for the Southern District of New York, Peter K. Leisure, J., entered after remand from this court for resentencing, United States v. Diaz, 797 F.2d 99 (2d Cir. 1986) (per curiam) (*Diaz II*). Judge Leisure sentenced Diaz to an aggregate period of incarceration of nine years, three years on each of three counts, to be served consecutively. Appellant claims that his sentence is illegal on due process and double jeopardy grounds. For reasons given below, we affirm the judgment of the district court.

The complicated circumstances leading up to this appeal are as follows. In April 1985, after a jury trial in the Southern District before John F. Keenan, J., Diaz was convicted on four conts of a six-count indictment: Count One, conspiracy to distribute heroin and cocaine, 21 U.S.C. § 846; Count Four, possession of cocaine with intent to distribute, 21 U.S.C. § 841; Count Five, use of a firearm during and in relation to crimes of violence, 18

U.S.C. § 924(c); and Count Six, receiving a firearm after being convicted of a felony 18 U.S.C. § 922(h). In July 1985, Judge Keenan sentenced Diaz to a period of incarceration that totalled nine years. The sentence then imposed consisted of concurrent four-year terms on Counts One, Four and Six, and a mandatory five-year term on Count Five, to be served consecutively to the other counts as required by 18 U.S.C. § 924(c). In addition, Judge Keenan imposed a special three-year parole term.

Diaz thereafter appealed. In United States v. Diaz, 778 F.2d 86 (2d Cir. 1985) (per curiam) (*Diaz I*), this court reversed appellant's conviction on Count Five, on which he had received the mandatory five-year consecutiv sentence. However, we affirmed Diaz's conviction on the remaining three counts, on which appellant had received four-year concurrent sentences, and remanded to the district court for resentencing. We stated:

> The maximum sentences provided by statute for the offenses charged in Counts One, Four and Six are substantially in excess of the sentences imposed. Therefore we are remanding so that the district court will have latitude to increase the sentences on Counts One, Four, and Six if it concludes that such increases are appropriate. 778 F.2d at 88-89. We cited McClain v. United States, 676 F.2d 915 (2d Cir.), cert. denied, 459 U.S. 879 (1982) (*McClain II*), as authority for our advice to the district court.

After the remand in *Diaz I,* Judge Keenan again sentenced Diaz to an aggregate term of nine years of imprisonment. On this occasion, however, the sentence consisted of concurrent nine-year terms on Counts One, Four and Six, again followed by a three-year special parole

term. Diaz again appealed, arguing that his sentence should be set aside because of due process and double jeopardy considerations and extrajudicial communications by the judge. Without reaching the other claims, this court was persuaded by the last argument. We remanded the case to the district court for reassignment to another district judge for resentencing. At the same time, citing *Diaz I,* we noted our earlier advice "expressly giving the district court 'latitude to increase the sentences on Counts One, Four, and Six if it concludes that such increases are appropriate.'" *Diaz II,* 797 F.2d at 99.

Upon remand, the matter was reassigned to Judge Leisure and, in February 1987, Diaz was resentenced. As had been done twice before, Judge Leisure imposed an aggregate period of nine years of incarceration. This time, however, the sentence consisted of consecutive three-year terms of imprisonment on the remaining three counts, again followed by a three-year term of special parole.

Diaz now appeals for a third time, arguing again that his resentence violates his right to due process and offends double jeopardy principles. Specifically, appellant claims that his sentence is illegal because in the absence of statutory authority the district court increased the sentence appellant had already started to serve and because the increase was not based on events occurring after the original sentencing. We do not find these arguments persuasive. In *Diaz I,* we expressly gave the district court "latitude to increase the sentences" on the remaining valid counts, citing *McClain II.* In *Diaz II,* in the face of arguments similar to those made now, we nevertheless noted that advice and the prior panel's reliance on *McClain II.* Judge Leisure therefore did precisely what *Diaz I* and *Diaz II* allowed him to do. We believe that at least our prior decision in *Diaz I* establishes the "law of the case" that on remand

the sentences on the remaining counts could be revised upwards (presumably no higher than the aggregate of the sentence originally imposed). As we have previously noted:

> The law of the case doctrine is discretionary in the Second Circuit, and the court sometimes may review an earlier ruling,. . . .Nevertheless, because there is a strong policy favoring finality the court exercises its underlying power to review earlier rulings "sparingly,". . . .(citations omitted).

McClain II, 676 F.2d at 917. We see no persuasive reason to disturb our earlier ruling in *Diaz I.*

Moreover, we would also seem to be bound by precedent because of *McClain II.* In that case, on very similar facts, a district judge had sentenced a defendant in 1975 to an aggregate term of 25 years: 15 years on an armed bank robbery count, 18 U.S.C. § 2113(d), and 10 years for using a firearm during the commission of the robbery, 18 U.S.C. § 924(c), which had to be served consecutively.[1] The defendant then began serving his sentence. Thereafter, in light of later decisions of the Supreme Court and this court holding that a defendant may not be sentenced under both sections 2113(d) and 924(c), this court vacated the entire sentence and remanded for resentencing. McClain v. United States, 643 F.2d 911 (2d Cir.), cert. denied, 452 U.S. 919 (1981) (*McClain I*). The district court then sentenced McClain under section 2113(d) alone to 20 years. This was a higher sentence than

1. Section 924(c) then provided for a consecutive sentence of one to ten years. The section was amended in 1984 in various respects, including fixing the terms of the mandatory consecutive sentence at five years. See United States v. Pisani, 787 F.2d 71, 73-74 (2d Cir. 1986) (on rehearing).

McClain had originally received on that count alone, but less than the aggregate of 25 years previously imposed. McClain again appealed, raising double jeopardy and due process arguments. In *McClain II,* we rejected those claims, pointing out that this was

> a situation in which the sentencing judge could not achieve the "package" he believed most appropriate through the use of concurrent sentences. Consecutive sentences were mandatory in this case under section 924(c) and the sentences were truly interdependent.

676 F.2d at 918. Therefore, we held that the judge could change the sentence on remand to carry out the original intention. The similarity to this case is obvious, and the precedent created in *McClain II* controls.

It is true, as Diaz argues to us now, that in *McClain II,* we expressly noted that in increasing the sentence on the remaining count after remand, the district court had considered the defendant's involvement in five incidents of misconduct in prison after the first sentencing. But we do not regard that observation as establishing that reliance on such post-sentence conduct is a necessary condition for an increase in sentence in the limited context present in that case and in this one. The rationale of *McClain II* was further explained in United States v. Pisani, 787 F.2d at 73, as follows:

> The District Judge. . . .had felt himself bound by section 924(c) to impose a mandatory consecutive sentence to whatever sentence he imposed on the bank robbery count. Apparently wishing to impose an aggregate sentence of twenty-five years, he selected a fifteen-year term for the robbery count and added a

> ten-year consecutive sentence under section 924(c). Since the judge had most likely given a shorter term on the robbery count than he would have given had he not felt bound to impose a consecutive sentence on the section 924(c) count, he was afforded an opportunity to increase the robbery sentence.

Under that rationale, after the mandatory consecutive sentence had been invalidated in *Diaz I,* Judge Leisure could carry out Judge Keenan's obvious original intent.

Finally, appellant also argues that United States v. DiFrancesco, 449 U.S. 117, 139 (1980), supports his claim that in the absence of statutory authority, it was improper for the district court to increase the sentence appellant had already started to serve. But the panel in *McClain II* actually relied upon *DiFrancesco* in holding that the resentence there did not offend the Double Jeopardy Clause. 676 F.2d at 918. In addition, although appellant has not made the point, we have considered whether the recent Supreme Court decision in Pennsylvania v. Goldhammer, 474 U.S. 28 (1985), requires us to repudiate *McClain II* and *Diaz I,* and we conclude that it does not.

The judgment of the district court is affirmed.

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of February one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,

Appellee,

-against-

JULIO DIAZ,

Appellant.

No. 87-1107

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Julio Diaz,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk